

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

MICHAEL HOLMBERG,

Plaintiff,

v.

DEPARTMENT OF CORRECTIONS OF  
WASHINGTON, BERNARD WARNER,  
PATRICK GLEBE, and CHERYL  
ROIKO,

Defendants.

CASE NO. 15-5374 RJB-JRC

ORDER ON MOTION FOR  
RECONSIDERATION

This matter comes before the Court on the Defendants' Motion for Reconsideration. Dkt. 21. The Court has considered the motion and the remaining record.

In this civil rights case, Plaintiff, a *pro se* prisoner, asserts claims for retaliation for exercise of his First Amendment rights pursuant to 42 U.S.C. §1983. Dkt. 1-1. Plaintiff also makes state law claims. *Id.*

## I. FACTS

The background facts and procedural history of this case are in the Report and Recommendation (Dkt. 16, at 1-7) and are adopted here.

On February 2, 2016, this undersigned adopted, in part, and declined to adopt, in part, the December 28, 2015 Report and Recommendation. Dkt. 20. Defendants then filed the motion for reconsideration (Dkt. 21) challenging one portion of the Court's decision which provided:

**Eleventh Amendment Immunity.** To the extent that Plaintiff makes claims against the DOC, Glebe and Warner (in Glebe and Warner's official capacities) those claims should not be dismissed with prejudice based on Eleventh Amendment immunity contrary to the recommendation in the Report and Recommendation. The Washington State Defendants removed this case from Thurston County, Washington Superior Court. Dkt. 1. "By removing the case to federal court, the State waived its Eleventh Amendment immunity from suit in federal court." *Embury v. King*, 361 F.3d 562, 564 (9th Cir. 2004). To the extent that the Report and Recommendation recommends dismissal of the damages claim with prejudice, the Report and Recommendation should be rejected. However, as stated in the Report and Recommendation, the claims against the DOC, Glebe and Warner (in Glebe and Warner's official capacities) are not supported by sufficient facts. Plaintiff should be given leave to file an amended complaint, if he wishes, to attempt to cure the deficiencies within 30 days of the date of this order.

Dkt. 20, at 6.

In their motion for reconsideration, Defendants explain that they did not intend to raise Eleventh Amendment immunity as a defense to all the Plaintiff's claims. Dkt. 21. They argue that Plaintiff's damage claims for constitutional violations, based on § 1983, asserted against DOC and Glebe and Warner in their official capacities, should be dismissed because state entities (which include claims against officials in their official capacities) are not "persons" within the meaning of § 1983. *Id.* (citing *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989)). Defendants also argue that the Court should "reconsider its order declining to dismiss

1 the Plaintiff's claims against DOC and Defendants Glebe and Warner in their official capacities."  
 2 *Id.*, at 5.

3 Under Local Rule W.D. Wash. 7(h)(3), a motion for reconsideration cannot be granted  
 4 without first giving other parties an opportunity to file a response. On February 24, 2016, the  
 5 motion for reconsideration was renoted and Plaintiff was informed that he may file a written  
 6 response to the motion for reconsideration on or before March 2, 2016. Dkt. 22.

7 Plaintiff filed a First Amended Complaint on March 2, 2016, making claims for violations of  
 8 his constitutional rights and state law. Dkt. 23. Although he does not specify for which claims  
 9 he seeks damages, as is relevant here, Plaintiff continues to assert that he is entitled to damages  
 10 in his First Amended Complaint. *Id.* Plaintiff also seeks injunctive relief. *Id.*

## 11 **II. DISCUSSION**

12 Local Rule W.D. Wash. 7(h)(1) provides: "[m]otions for reconsideration are disfavored.  
 13 The court will ordinarily deny such motions in the absence of a showing of manifest error in the  
 14 prior ruling or a showing of new facts or legal authority which could not have been brought to its  
 15 attention earlier with reasonable diligence." Local Rule 7(h)(3) further provides, "[n]o response  
 16 to a motion for reconsideration shall be filed unless requested by the court. No motion for  
 17 reconsideration will be granted without such a request."

18 In order to state a claim under 42 U.S.C. § 1983, a complaint must allege that (1) the conduct  
 19 complained of was committed by a person acting under color of state law, and that (2) the conduct  
 20 deprived a person of a right, privilege, or immunity secured by the Constitution or laws of the United  
 21 States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds*, *Daniels v.*  
 22 *Williams*, 474 U.S. 327 (1986). States (or state officers acting in their official capacity) are not  
 23 "persons" for purposes of damages for § 1983 liability. *Will v. Michigan Dep't of State Police*,  
 24 491 U.S. 58, 66 (1989); *Doe v. Lawrence Livermore Nat'l Lab.*, 131 F.3d 836, 839 (9th Cir.

1997). “However, there is one exception to this general rule: When sued for *prospective injunctive* relief, a state official in his official capacity is considered a ‘person’ for § 1983 purposes.” *Doe*, at 839 (*emphasis in original*).

Defendants’ motion for reconsideration (Dkt. 21) should be granted to the extent that they seek reconsideration of the decision to deny dismissal of Plaintiff’s claims for violations of his constitutional rights under §1983 asserted against DOC, and damages or other retroactive relief for violations of his constitutional rights against Glebe and Warner, in their official capacities. Defendants’ motion to dismiss Plaintiff’s claims for violations of his constitutional rights, brought pursuant to § 1983, against DOC, and damages or other retroactive relief for violations of his constitutional rights, brought pursuant to § 1983, against Glebe and Warner, in their official capacities only, should be granted. Plaintiff’s claims for violation of his constitutional rights pursuant to § 1983 against DOC should be dismissed. Plaintiff’s damages or other retroactive relief claims for violation of his constitutional rights pursuant to § 1983 against Glebe and Warner, in their official capacities, should be dismissed. These dismissals apply to such claims brought in the Plaintiff’s First Amended Complaint.

This order does not reach or address any of the other claims asserted in the First Amended Complaint.

### III. ORDER

- The Defendants’ Motion for Reconsideration (Dkt. 21) is **GRANTED, AS FOLLOWS:**
- Plaintiff’s claims for violations of his constitutional rights, brought pursuant to § 1983, against Defendant Department of Corrections **ARE DISMISSED**; and

- Plaintiff's damages or other retroactive relief for violations of his constitutional rights, brought pursuant to § 1983 against Defendants Glebe and Warner, in their official capacities only, **ARE DISMISSED**.

The Clerk is directed to send uncertified copies of this Order to U.S. Magistrate Judge J. Richard Creatura, all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 9<sup>th</sup> day of March, 2016.

A handwritten signature in black ink, reading "Robert J. Bryan", written over a horizontal line.

ROBERT J. BRYAN  
United States District Judge